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In The

Supreme Court of the United States

October Term, 1994

DAN MORALES, AS ATTORNEY GENERAL FOR THE STATE OF TEXAS, AND ALBERT ENDSLEY, AS TEXAS CONSUMER CREDIT COMMISSIONER,

Petitioners,

vs.

FIRST GIBRALTAR BANK, F.S.B., AND BENEFICIAL FINANCE, TEXAS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION OF RESPONDENTS FIRST GIBRALTAR BANK, F.S.B., AND BENEFICIAL FINANCE, TEXAS, INC.

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QUESTION RESTATED

Whether the Fifth Circuit correctly concluded that the Federal Home Loan Bank Board's reasonable interpretation of its own regulations, with which the Office of Thrift Supervision fully concurs, deserved deference?

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OPPOSITION OF RESPONDENTS FIRST GIBRALTAR BANK, F.S.B., AND BENEFICIAL FINANCE, TEXAS, INC.

Respondents First Gibraltar Bank, F.S.B. and Beneficial Finance Texas, Inc. respectfully request that the Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

Petitioner's Appendices provide the pertinent opinions.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1254.

SUMMARY OF ARGUMENT

The Petitioner asks this Court to grant writ of certiorari in order to determine the amount of deference due a federal agency's interpretation of its own regulations. This Court resolved that question at least as early as 1945. *See Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-14, 65 S.Ct. 1215, 1217 (1945) (when a case "involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt"). In fact, this Court has consistently held that an agency's interpretation of the regulations that it has promulgated has "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Udall v. Tallman*, 380 U.S. 1, 16-17, 85 S.Ct. 792, 801 (1965) (quoting *Bowles*, 325 U.S. at 413-14, 65 S.Ct. at 1217). *See also Stinson v. United States*, ___ U.S. ___, 113 S.Ct. 1913, 1919 (1993).

The Petitioner, however, emphasizes that the agency's opinion occurred in an Office of General Counsel advisory letter, suggesting that it was the private opinion of an individual attorney. (Pet. at 10). An Office

of General Counsel letter, however, is the agency's opinion. *See e.g., Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 94, 94 S.Ct. 334, 339 (1973) (general counsel's advisory letter was agency's interpretation); *Thorpe v. Housing Authority*, 393 U.S. 268, 276, 89 S.Ct. 518, 523 (1969) (Court examined letters by staff members, as well as contrasting language in another circular, to determine that HUD intended circular to be mandatory). The Federal Home Loan Bank Board ("FHLBB"), moreover, issued its opinion to a cabinet-level agency of the federal government (the Department of Housing and Urban Development ("HUD")), the letter was published by Commerce Clearing House, and the Office of Thrift Supervision ("OTS," the successor to the FHLBB)[1] has confirmed its complete agreement with the FHLBB opinion. *See* Brief of Amicus Curiae, The Office of Thrift Supervision (Res. App. 1). Thus the FHLBB's Office of General Counsel interpretative letter can hardly be considered the private opinion of individual attorney.

Furthermore, the Fifth Circuit's observation that an agency's interpretation of its own regulations deserves deference unless unreasonable occurs only in an alternative holding. *First Gibraltar v. Morales*, 19 F.3d 1032, 1047 (5th Cir. 1994) (Pet. A-30) ("Even assuming for the sake of argument that 12 C.F.R. § 545.32(c)(2) creates some ambiguity as to the authority of federal savings associations to engage in RAMs and line of credit conversion mortgages, we must give substantial deference to agency

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[1] The Federal Home Loan Bank Board, and its successor, the Office of Thrift Supervision, will sometimes be referred to collectively as the "Agency."

interpretations of these regulations that resolve the ambiguity."). The Fifth Circuit had ample, independent support in the history, content, purpose, and structure of the regulations for its conclusion that the Federal Home Loan Bank Board intended to supersede state law when it authorized alternative mortgage instruments nationwide. *Id.* at 1045 (Pet. A-26). In fact, the Petitioner's argument that the regulations may be ambiguous merely suggests that the Fifth Circuit's alternative holding should be reached: it does not suggest that the Fifth Circuit's opinion was incorrect, much less a reason for granting the writ.

FACTUAL AND PROCEDURAL BACKGROUND

In 1978, the Federal Home Loan Bank Board authorized the use of three new varieties of mortgage instruments: the variable rate mortgage, the graduated payment mortgage, and the reverse annuity mortgage. 43 Fed. Reg. 59,336, 59,336 (1978) (regulation effective Jan. 1, 1979) ("The variable rate mortgage will . . . be authorized on a state-by-state basis; the graduated payment mortgage and reverse-annuity mortgage are hereby authorized nationwide.") (Res. App. 16). Although these instruments are now commonplace, they were considered radical innovations at the time, and they conflicted with the law of a majority of states. *See e.g.*, 46 Fed. Reg. 24,148, 24,151 (1981) (Res. App. 17). Both the graduated payment mortgage, for example, and the reverse annuity mortgage violated the usury laws of as many as thirty states that proscribed the charging of interest on interest. *Id.* ("[t]his preemption has the effect of precluding the

application of the laws of approximately 30 states prohibiting the charging of interest on interest. . Nevertheless, after years of careful study, including a three volume research study, hearings before Congress, and a notice and comment period, the Agency authorized alternative mortgage instruments nationwide, concluding that they are necessary in order "to meet the needs of homeowners during different phases of their financial life cycles." 43 Fed. Reg. 59,336, 59,336 (1978) (Res. App. 16).

The authorization of reverse mortgages also directly conflicted with the uniquely severe provisions of the Texas homestead exemption law. Texas law invalidates any lien on a homestead not created in order to purchase, construct improvements, or pay property taxes on the homestead. TEX. CONST. art. XVI, § 50; *see also* TEX. PROP. CODE ANN. § 41.001. Furthermore, the homestead exemption cannot be waived. *Id.* ("No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided") (Pet. A-68). Reverse mortgages conflict with the Texas homestead exemption law because they are secured by home equity and are seldom, if ever, used to pay property taxes or to construct home improvements. Thus Texas homeowners cannot obtain loans secured by home equity for such purposes as to pay for a child's education, to supplement retirement income, or to start or expand a small business. Even when the homeowner can obtain an unsecured loan, the loan generally has a higher rate of interest, and the interest cannot be deducted from the homeowner's federal income taxes.

In 1981, the Agency amended its alternative mortgage transactions regulation in order "to enhance associations' ability to balance the yields of their investment portfolios with their liabilities, and to meet borrowers' needs for additional home-financing options." 46 Fed. Reg. 51893, 51893 (October 23, 1981) (summary to final rule) (Res. App. 16). The Agency also reasoned that the amended reverse mortgage regulation would "greatly improve the marketability of [reverse annuity mortgage] loans, which have not been widely used by federal associations." 46 Fed. Reg. 51893, 51895 (October 23, 1981) (Res. App. 16).

Significantly, the Agency chose to emphasize its preemption of conflicting state law by adding an express preemption. 46 Fed. Reg. 24148, 24151-52 (April 30, 1981) (Res. App. 17). Consequently, the Agency inserted a new paragraph into the amended regulation stating that "[t]his exercise of the Board's authority is preemptive of any state law purporting to address the subject of a federal association's ability or right to make, purchase, or participate in the alternative mortgage instruments set forth in this section [545.6-4], or to directly or indirectly restrict such ability or right." 46 Fed. Reg. 24148, 24151 (April 30, 1981) (Res. App. 17); 12 C.F.R. § 545.6-4(a)(2) (1982) (Pet. A-76). This amended regulation included reverse mortgages. *Id.* Furthermore, when the Agency amended its reverse mortgage regulation a few months later, it specifically explained that the express preemption in "the alternative mortgage instruments regulation. . . . covers the [reverse annuity mortgage] amendments as well." 46 Fed. Reg. 51893, 51896 (October 23, 1981) (Res. App. 18). As the Fifth Circuit specifically concluded, the regulations in effect in 1982 undoubtedly preempted the

conflicting provisions of Texas law. 19 F.3d at 1044 (Pet. A-24) ("We think it clear that, had this action been brought under the regulatory scheme in place in 1982, Texas' homestead laws would be preempted by the clear intent of the FHLBB in promulgating its regulations regarding RAMs.").

In 1982, Congress not only approved of the Agency's preemption of state law with regard to alternative mortgage transactions, it extended that preemption to non-federally chartered housing creditors by enacting the Alternative Mortgage Transaction Parity Act ("Parity Act") as Title VIII of the Garn-St. Germain Depository Institution Act of 1982. Pub. L. 97-320, 96 Stat. 1469, 1545, as codified at 12 U.S.C. §§ 3801-3806 (1982). The express purpose of the Parity Act was to end discrimination between federally and nonfederally chartered housing creditors by authorizing all housing creditors[2] to "make, purchase and enforce alternative mortgage transactions so long as the transactions are in conformity with the regulations issued by the Federal agencies."[3] 12 U.S.C. § 3801(b). Consequently, Congress expressly provided that the Parity Act should prevail "notwithstanding any state constitution, law or regulation." 12 U.S.C. § 3803(c).

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[2] A "housing creditor" is "any person who regularly makes loans, credit sales or advances secured by interests in [homes] or any transferee of any of them." 12 U.S.C. § 3802(2)(C and D).

[3] Banks may engage in alternative mortgage transactions subject to Comptroller of the Currency ("OCC") regulations, and credit unions may engage in such transactions subject to National Credit Union Administration ("NCUA") regulations. All other housing creditors may engage in such transactions subject to OTS regulations.

Also in 1982, this Court recognized the FHLBB's authority to preempt state law with regard to the mortgage lending activities of federal savings associations in *Fidelity Federal v. de la Cuesta*, 458 U.S. 141, 102 S.Ct. 3014 (1982). In finding authority to preempt California mortgage and foreclosure law, this Court observed that "Congress expressly contemplated, and approved the Board's promulgation of regulations superseding state law." *Id.* at 162, 3027. Furthermore, the Court recognized that federal preemption is not "inapplicable . . . simply because real property law is a matter of special concern to the States." *Id.* at 153, 3022 (quoting *Free v. Bland*, 369 U.S. 663, 666, 82 S.Ct. 1089, 1092 (1962)). Indeed, "a savings and loan's mortgage lending practices are a critical aspect of its 'operation,' over which the Board unquestionably has jurisdiction." *Id.* at 167, 3029-30. Significantly, *Free v. Bland*, on which the Court relied for this proposition, involved Department of the Treasury regulations that preempt Texas community property law. *See also United States v. Rodgers*, 461 U.S. 677, 103 S.Ct. 2132 (1983) (preempting Texas homestead law).

In 1983, the Agency responded to enhanced authority under the Garn-St. Germain Act by authorizing federal savings associations to engage in all forms of investment activities authorized by the Home Owners Loan Act ("HOLA") unless otherwise restricted under Agency regulations. 48 Fed. Reg. 23032, 23032 (May 23, 1983) (Res. App. 19); 12 C.F.R. § 545.1 (1983). Consequently, the Agency ended its practice of granting specific authority, and instead authorized federal associations to engage in all investment activities permitted under the HOLA unless otherwise prohibited by Agency regulations. As part of that change in regulatory philosophy, the Agency

deleted regulations granting specific authority, including the alternative mortgage transactions regulation, moving the preemption of state law contained in that section to section 545.2. The Agency, moreover, emphasized that it was not eliminating any existing authority, including the authority to engage in alternative mortgage transactions. 48 Fed. Reg. 23032, 23032 (1983) ("The Board emphasizes that deletion of sections specifically implementing existing authority does not mean that any authority can no longer be exercised.") (Res. App. 19).

Under the new regulations, federally-chartered savings and loan associations may engage in "loans on the security of liens upon residential real property." 12 U.S.C. § 1464(c)(1)(B). That authority is limited only by Agency regulations, which specifically permit a federally-chartered association to "exercise all authority granted . . . by the [HOLA] . . . whether or not implemented specifically by Office regulations, subject to the limitations and interpretations contained in this part." 12 C.F.R. § 545.1. As the Agency observed in its Office of General Counsel interpretative letter, alternative mortgage transactions "are, in fact, loans on the security of residential real estate." Fed. Banking L. Rep. (CCH) ¶ 82,502 (Aug. 4, 1989) (Pet. A-77, 81). Thus "Federal associations may offer such mortgages to their borrowers, subject only to the restrictions of 12 C.F.R. pt. 545." *Id.* (Pet. A-81-82). Furthermore, the Agency continued to preempt "any state law purporting to address the subject of the operations of a Federal savings association," which, as the Agency observed in its Office of General Counsel letter, establishes that the Agency did not cede its authority over alternative mortgage transactions to the states. *Id.* (Pet. A-87-88, n.9). Under this grant of authority, federal

associations in forty-nine states other than Texas engage in alternative mortgage transactions secured by home equity.

In 1987, Congress confirmed the Parity Act's preemption of state law pertaining to alternative mortgage transactions by authorizing the Secretary of the Department of Housing and Urban Development to implement a demonstration program of insurance of reverse mortgages for elderly homeowners despite contrary state law. Housing and Community Development Act of 1987, 12 U.S.C. § 1715z-20(c). When HUD attempted to implement the program in Texas, however, it discovered that lenders were unwilling to participate because of the state's homestead exemption law.

After examining the applicable Bank Board regulations, and the Alternative Mortgage Transactions Parity Act, HUD concluded that the Bank Board had preempted the conflicting provisions of Texas law. Consequently, it requested an interpretative letter from the Bank Board's Office of General Counsel confirming the preemption. HUD, Request for Agency Opinion, by John A. Maxim, Jr., dated Nov. 16, 1988 (opining that the express preemption in the Parity Act "and the applicable [FHLBB] regulations are broad enough to include reverse mortgages in Texas.") (Res. App. 23). The Bank Board responded with an Office of General Counsel letter dated August 4, 1989. Fed. Banking L.Rep. (CCH) ¶ 82,502, at 61,707-08 (August 4, 1989) (Pet. A-77).

After reviewing the applicable regulations, case law, and other opinion letters, the Bank Board concluded that the HOLA authorized the Agency to enact regulations that preempt substantive state real property laws purporting to govern the mortgage lending operations of

federal associations, and that the Agency "exercised this authority to preempt state real property laws, insofar as reverse mortgages are concerned." Office of General Counsel Interpretative Letter, Fed. Banking L. Rep. (CCH) ¶ 82,502 (Pet. A-89). The Agency observed that its 1979 alternative mortgage transactions regulation authorized the use of reverse mortgages in Texas, and that the Agency's 1983 change in regulatory approach evinced no intent to cede that authority to the states. *Id.* (Pet. A-79-81). The Agency concluded, therefore, that "[t]he Texas laws in question clearly prevent Federal associations from exercising the authority granted to them by the HOLA and the Board's regulations." *Id.* (Pet. A-88). Thus "the constitution and statutes of Texas under review are 'an obstacle to the accomplishment and execution of the purposes and objectives' of 12 C.F.R. pt. 545 to the extent that they prevent Federal associations from securing line of credit conversion mortgages with real estate consisting of homesteads, and foreclosing on such mortgages in the event of default." *Id.* The pertinent regulations are essentially unchanged since 1989, when the FHLBB issued its Office of General Counsel letter to HUD. Furthermore, the Office of Thrift Supervision, as the successor to the FHLBB, continues to fully concur in the FHLBB's opinion, and in fact, submitted an amicus brief to the Fifth Circuit strongly supporting Respondent's position. (Res. App. 1).

After examining the FHLBB Office of General Counsel letter, Bruce Gibson, Chairman of the Government Organization Committee of the Texas House of Representatives, requested an opinion from the Texas Attorney General confirming that FHLBB regulations authorizing

alternative mortgage transactions preempted the conflicting Texas restrictions on home equity lending. The Attorney General declined to express an opinion on whether FHLBB regulations preempt the conflicting provisions of the Texas homestead exemption law with regard to federal savings associations. No. JM-1269 (1990). The Attorney General, however, specifically invited litigation "in which the relevant state and federal policies can be thoroughly briefed and argued." *Id.*

Respondents, First Gibraltar Bank, F.S.B., and Beneficial Texas, Inc., responded by seeking a declaration in federal district court that federal law preempts Texas homestead law to the extent that Texas law prohibits federal savings associations from enforcing liens taken in alternative mortgage transactions secured by a homeowner's equity, and that this federal preemption extends to state-chartered institutions under the Parity Act. In addition, Respondents sought appropriate injunctive relief to carry out those declarations. Both sides moved for summary judgment. The district court denied the plaintiffs' motion and granted summary judgment in favor of the defendants. *First Gibraltar v. Morales*, 815 F.Supp. 1008 (W.D.Tex.1993) (Pet. A-48). In its opinion, the district court acknowledged that the OTS has the authority to preempt state law with regard to the mortgage investment activities of federal savings associations, and that whether the OTS exercised that authority was a question of Agency intent. *Id.* at 1012-13 (Pet. A-59). In addition, the district court recognized that the OTS issued an interpretative letter stating specifically that Agency regulations had preempted Texas law with regard to the enforceability of reverse mortgages and line-of-credit conversion mortgages secured by a homeowner's equity,

and that the Agency's opinion was entitled to great deference.[4] *Id.* at 1014-15 (Pet. A-63). The district court, however, concluded, that an OTS regulation permitting federal associations to take security interests in timeshare units made the Agency's interpretation of its own regulations arbitrary and unreasonable. *Id.* (Pet. A-64). The Fifth Circuit reversed, concluding that OTS regulations preempt Texas homestead restrictions on home equity lending, at least with regard to reverse mortgages and line-of-credit conversion mortgages, and that Congress in the Parity Act extended that preemption to state housing creditors. 19 F.3d at 1049, 1053 (Pet. A-36, 46-47). In addition, the Fifth Circuit concluded that the Agency's interpretation of its regulations was reasonable, and that the definition of "security property," which was meant to expand the authority of federal associations to accept non-traditional forms of security, did not preclude the Agency from authorizing alternative mortgage instruments in Texas. *Id.* at 1046-47 (Pet. A-28-30).

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[4] Both line-of-credit conversion mortgages and reverse mortgages are alternative mortgage transactions secured by a homeowner's equity. A "line-of-credit conversion mortgage," in fact, is essentially a variant of the reverse mortgage. Office of General Counsel interpretative letter (Pet. A-78). Both kinds of instruments permit the homeowner to convert home equity into liquid assets. The principal difference is that reverse mortgages generally provide for payments at regular intervals whereas home equity conversion mortgages allow the homeowner to receive a payment or payments on demand. *Id.*

REASONS FOR DENYING THE PETITION

According to the Petitioner, this Court should grant writ of certiorari in order to decide the degree of deference that should be accorded an agency's interpretation of its own regulations. (Pet. at 8) This Court has decided that question since at least 1945. *See Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-14, 65 S.Ct. 1215, 1217 (1945). In arguing that the degree of deference is an open question, the Petitioner cites a case in which the Court's resolution of the merits made it unnecessary for the Court to consider whether an agency's *statutory* interpretation contained in a memorandum is entitled to any less deference than an interpretation adopted by rule or adjudication. (Pet. at 8-9) (citing *City of Chicago v. Environmental Defense Fund*, ___ U.S. ___, 114 S.Ct. 1588, 1594 n.5 (1994)).[5] Even if that question could be considered open, it is not present in this case.[6]

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[5] The Petitioner also cites *Ludwig v. Variable Annuity Life Ins. Co.*, which involves an agency's statutory interpretation that the Fifth Circuit found directly conflicted with the statute itself. 998 F.2d 1295 (5th Cir. 1992), *cert. granted*, 114 S.Ct. 2161 (1994).

[6] For purposes of his Petition, the Attorney General has not questioned the authority of the Agency to preempt the conflicting provisions of the Texas homestead exemption law. (Pet. at 22 n.11). The Petitioner, however, appears to question whether the authorization of alternative mortgage instruments is regulation of the "operations" of a federal association. (Pet. at 18). As this Court has explained, however, the Agency's authority must extend to promulgating preemptive "regulations governing mortgage loan instruments, for mortgages are a central part of any savings and loan's 'operation.' " *De la Cuesta*, 458 U.S. at 161, 102 S.Ct. at 3026. In fact, it is difficult to conceive of a matter more critical to a savings and loan's operations than the

Rather, this case involves the agency's interpretation of its own regulations. Because the administrator has special expertise with regard to the history, background, and intent of agency regulations, this Court has consistently held that "a court must necessarily look to the administrative construction of the regulation if the meaning of the words is in doubt." *Bowles*, 325 U.S. at 413-14, 65 S.Ct. at 1217. In fact, the agency's interpretation has "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Udall v. Tallman*, 380 U.S. 1, 16-17, 85 S.Ct. 792, 801 (quoting *Bowles*, 325 U.S. at 413-14, 65 S.Ct. at 1217). *See also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850 (1989); *Lyng v. Payne*, 476 U.S. 926, 939, 106 S.Ct. 2333, 2341 (1986); *United States v. Larionoff*, 431 U.S. 864, 872-73, 97 S.Ct. 2150, 2155-56 (1977); *United States v. City of Chicago*, 400 U.S. 8, 10, 91 S.Ct. 18, 20 (1970); *Immigration and Naturalization Service v. Stanisic*, 395 U.S. 62, 72, 89 S.Ct. 1519, 1525-26 (1969); 2 K. Davis, ADMINISTRATIVE LAW TREATISE § 7:22, pp. 105-107 (2d ed. 1979).

The Petitioner also contends that "[t]he court of appeals failed to apply this Court's standards as to when courts should defer to official agency *statutory* interpretations." (Pet. at 11) (emphasis added). This case involves the Agency's regulatory interpretation, and this Court, moreover, has never required that a court consider all of the factors that the district court listed in *Weber v. Heaney*, 793 F.Supp. 1438, 1455 (D. Minn. 1992), *aff'd*, 995 F.2d 872 (8th Cir. 1993). In fact, the *Heaney* court considered only that Federal Election Commission was "precisely the type of agency to which deference

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regulation of the kind of home mortgages that it can offer to borrowers.

should be afforded." *Heaney*, 793 F.Supp. at 1455 (quoting *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 38. 102 S.Ct. 38, 44-45 (1981)). It deserved deference, the court reasoned, because "Congress vested the agency with plenary authority, both rulemaking and adjudicative, to regulate the conduct of federal elections." *Id.* Similarly, Congress delegated plenary authority to the FHLBB (now the OTS) to regulate the operations of federal savings associations. *Fidelity Federal v. de la Cuesta*, 458 U.S. 141, 167, 102 S.Ct. 3014, 3029-30 (1982). And that authority includes promulgating preemptive regulations pertaining to the mortgage lending activities of federal savings associations. *Id.* ("a savings and loan's mortgage lending practices are a critical aspect of its 'operation,' over which the Board unquestionably has jurisdiction."). In fact, the only factor listed in *Heaney* that does not strongly support the Fifth Circuit's position is that Texas lenders have been unwilling to rely on the Agency's opinion by engaging in home equity lending. That reluctance, however, is understandable because any financial institution that desires to make loans in violation of the state's homestead law not only risks losing its security, but may also be subject to state enforcement actions, including loss of license, cease and desist orders, and civil damage actions under the states consumer protection laws. *See e.g.*, Texas Consumer Credit Commissioner, Interpretative Letter No. 86-6 (Dec. 16, 1986).

In addition, the Petitioner suggests that the Agency's interpretation of its *regulations* do not deserve deference because that interpretation is not embodied in a *regulation*. (Pet. 14). This Court, however, has never held that an agency can interpret its regulations only by promulgating a new regulation. *See e.g., Thorpe v. Housing Authority*, 393 U.S. 268, 276, 89 S.Ct. 518, 523 (1969) (letters by staff

members, as well as contrasting language in another circular, were used to determine that a HUD circular was intended to be mandatory).

The Petitioner also contends that a conflict in the circuits exists with regard to the amount of deference due an agency's interpretations respecting preemption. (Pet. at 13) (citing *Colorado Pub. Utils. Comm'n v. Harmon*, 951 F.2d 1571, 1579 (10th Cir. 1991)). Again, even assuming the existence of a question on that issue, it is not clearly presented in this case because the Fifth Circuit did not merely defer to the Agency's conclusions concerning preemption. It concluded independently that a preemption had occurred, and that the Agency's interpretation of its regulations was reasonable. *First Gibraltar*, 19 F.3d at 1044, 1049 (Pet. A-24, 36). Furthermore, the Agency clearly has expertise with regard to the history and intent of its regulations, which were the critical issues that the Fifth Circuit examined. *Id.* at 1044 (Pet. A-36). In fact, the Tenth Circuit acknowledged that an agency's interpretation concerning the scope and application of its regulations requires deference. *Harmon*, 951 F.2d at 1579.

Furthermore, the Fifth Circuit considered the question of deference only in an alternative holding. *First Gibraltar v. Morales*, 19 F.3d 1032, 1047 (5th Cir. 1994) (Pet. A-30) ("Even assuming for the same of argument that 12 C.F.R. § 545.32(c)(2) creates some ambiguity as to the authority of federal savings associations to engage in RAMs and line of credit conversion mortgages, we must give substantial deference to agency interpretations of these regulations that resolve the ambiguity."). In fact, the Fifth Circuit had ample support for its conclusion that the Agency preempted the conflicting provisions of Texas law, without reference to the Agency's General Counsel

letter, in the history, purpose, structure, and content of the agency's regulations. *Id.* at 1045 (Pet. A-26).

In examining the history of the regulation, the Fifth Circuit observed that if this lawsuit had been brought in 1982, rather than 1992, that no doubt could exist that the agency had preempted Texas law. *Id.* at 1044 (Pet. A-24) ("We think it clear that, had this action been brought under the regulatory scheme in place in 1982, Texas' homestead laws would be preempted by the clear intent of the FHLBB in promulgating its regulations regarding RAMs"). The regulations in effect prior to 1983 expressly preempted any state laws that "directly or indirectly" restrict the ability of federal savings associations to engage in graduated payment or reverse annuity mortgages. *Id.* at 1045 (Pet. A-25) (citing 12 C.F.R. § 545.6-4(a)(2) (1982)). They preempted Texas law because Texas law invalidates the liens taken in connection with such mortgages. *Id.* at 1044-45 (Pet. A-24-25). The Texas homestead laws also directly conflicted with the Agency's express purpose to "meet the needs of homeowners during different phases of their financial life cycles." 43 Fed. Reg. 59,336, 59,336 (1978). As the Fifth Circuit observed, these restrictions have resulted in removing "from $150 to $260 [b]illion in home equity from the lending market, illustrating the substantial limitation on the ability of federal savings associations to make [reverse mortgages] in Texas." *First Gibraltar*, 19 F.3d at 1044-45 (Pet. A-25) (citing Texas House Research Organization, No. 147, Special Legislative Report: Second Mortgages and the Texas Homestead Exemption 30 (Dec. 21, 1988)).

Furthermore, the Fifth Circuit found "that the FHLBB did not manifest an intent to end its preemption of inconsistent state laws, such as Texas' homestead laws, in its 1983 revision of its real estate lending regulations." *Id.* at 1045 (Pet. A-26). In reaching that conclusion, the Fifth Circuit observed that current OTS regulations assume that federal associations will be able to enter into and enforce home equity loans. *Id.* at 1045-46 (Pet. A-26-27). Section 545.32(b)(4), for example, provides that "a real estate loan may be fully amortized, partially amortized, non-amortized, or a line-of-credit loan, and the loan contract may provide for the deferral and capitalization of a portion of the interest." 12 C.F.R. § 545.32(b)(4) (1993). This provision specifically authorizes federal savings associations to make line-of-credit loans and reverse mortgages by authorizing the amortization techniques associated with reverse mortgages, and by stating that "a real estate loan may be . . . a line of credit loan." *Id.*

The regulation governing home loans, moreover, authorizes federal associations to use loan contracts that "provide for the deferral and capitalization of all interest on loans to natural persons secured by borrower-occupied property and on which periodic advances are being made." 12 C.F.R. § 545.33(a) (1993). This provision describes reverse mortgages. The preamble to the final regulations, moreover, explicitly states that "loan contract[s] may provide for negative amortization of a portion of the interest, or of all interest on a loan such as a *reverse annuity mortgage*." 48 Fed. Reg. 23032, 23,037-38 (emphasis added) (Res. App. 21). In addition, the Agency explained in the summary to the final rule that 12 C.F.R. § 545.34 "would require disclosure of provisions in a contract for a reverse annuity mortgage under which the outstanding loan principal may become due and

payable as a result of the borrower's death, upon maturity of the loan, or upon a failure to maintain the security property." 48 Fed. Reg. 23032, 23040 (May 23, 1983) (Res. App. 22). These provisions establish that federal associations continued to have the power to engage in alternative mortgage transactions secured by a homeowner's equity.

The Agency's "notice of housing creditors regarding alternative mortgage transactions" provides additional evidence that the Agency did not intend to eliminate the authority previously granted to engage in alternative mortgage transactions. 12 C.F.R. § 545.33(h). The Agency observes in that section that housing creditors, other than federal savings associations, may engage in alternative mortgage transactions, as defined in the Parity Act, "notwithstanding any state constitution, law or regulation." *Id.* It then identifies OTS regulations that place a restriction upon the ability of such creditors to engage in alternative mortgage transactions. None of the listed provisions prevents a lender from engaging in home equity loans.[7] *Id.* In fact, the section that the Petitioner contends places a limitation on a federal association's right to engage in alternative mortgage transactions, section 545.32(c), is not referred to in this section as a limiting provision. *Id.*

Furthermore, continued authority to engage in home equity lending is consistent with the structure of the Agency's amended regulations, which were meant "to

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[7] The listed provisions concern matters such as the creditor's ability to adjust the interest rate, payment balance, or term to maturity; the deferral and capitalization of interest on loans to natural persons secured by owner-occupied residential property; and the disclosures that the creditor must make to the borrower.

grant associations the maximum flexibility to exercise the authorities of the HOLA." 48 Fed. Reg. 23032, 23032 (May 23, 1983). *See also, Wisconsin League of Financial Institutions, Ltd. v. Galecki*, 707 F.Supp. 401 (W.D.Wis. 1989) (finding structure of OTS regulations support preemption of state law). The Agency specifically stated, in fact, that its sole purpose in revising Part 545 was "to permit Federal associations to engage in all activities authorized by statute subject to these regulations and to. . . . expand the investment authority of, and services offered by, Federal associations." 48 Fed. Reg. 23032, 23032 (May 23, 1983) (Res. App. 19).

Preemption is also consistent with the Agency's purpose "to enhance associations' ability to balance the yields of their investment portfolios with their liabilities, and to meet borrowers' needs for additional home-financing options." 46 Fed. Reg. 51893, 51893 (October 23, 1981) (summary to final rule) (Res. App. 16). In addition, it is consistent with Congress' purpose in enacting the HOLA "to provide the country with sources of housing financing at a time when 'more than half the counties in the country, containing almost one-fifth of the total population were without home-financing institutions." *First Gibraltar*, 19 F.3d at 1051 (Pet. A-41) (quoting *de la Cuesta*, 458 U.S. at 159-60, 102 S.Ct. at 3026). That purpose has been "expanded in 12 U.S.C. § 1464(a), which authorizes the OTS to regulate the organization and operation of federal savings associations '[i]n order to provide thrift institutions for the deposit of funds and the extension of credit for homes and other goods and services.' " *Id.* (Pet. A-42). The decision to make home equity lending available in Texas, the Fifth Circuit reasoned, and "thereby greatly expanding the pool of collateral available to Texans for borrowing purposes, is entirely consistent with the HOLA's

purpose of ensuring the broadest availability of credit for general consumer purposes." *Id.* Finally, the Agency's decision to authorize alternative mortgage instruments nationwide is consistent with Congress' purpose in the Alternative Mortgage Transactions Parity Act to increase the "supply of credit secured by residential property." *Id.*

Thus, as the Fifth Circuit concluded, the ability of federal savings associations to engage in alternative mortgage transactions, previously granted by 12 C.F.R. § 545.6-4 (1982), was undiminished by the regulatory change in 1983. *Id.* at 1045 (Pet. A-26). In fact, the Agency specifically stated with respect to reverse mortgages that "the substance of these provisions is unchanged from the Board's prior regulations." 48 Fed. Reg. 23032, 23037-38 (May 23, 1983) (Res. App. 21).

As the Fifth Circuit concluded, these materials, taken together, demonstrate the Agency's intent to preempt Texas homestead law insofar as it would prohibit federal savings associations from entering into alternative mortgage transactions. *First Gibraltar*, 19 F.3d at 1044 (Pet. A-24-25). The Fifth Circuit also concluded that a definition of "security property," which was meant to expand the ability of federal associations to accept non-traditional forms of security, such as interests in time-share units, did not preclude the authorization of alternative mortgage instruments in Texas. 12 C.F.R. § 545.32(c)(2) (1993); (Pet. 18-19).

As the Fifth Circuit correctly observed, the history of this definitional section establishes that the Agency did not intend to limit home equity lending. *First Gibraltar*, 19 F.3d at 1046-48 (Pet. A-28-30). As the preamble to the 1983 revision of the regulations establishes, the Agency

adopted section 545.32(c) to deal with the problem of classifying property interests in time share units. *Id.* at 1046 (Pet. A-28). Before the 1983 revision, the Agency authorized loans on time-share units only as consumer loans. *Id.* (citing 48 Fed. Reg. 23032, 23036 (May 23, 1983)). "The FHLBB promulgated § 545.32(c) 'in order to make clear what is required for a loan to be secured by real estate.' " *Id.* The Agency provided under the revised regulation that "an association may make a real estate loan on the security of a time-share unit if the security property is real estate under state law." *Id.* Thus, as the OTS explained in its amicus brief to the Fifth Circuit, the sole purpose of section 545.32(c)(2) was to authorize federal savings associations to accept non-traditional security interests, such as interests in time-share units, when state law grants the rights and remedies usually associated with "a real estate mortgage or its equivalent." 12 C.F.R. § 545.32(c)(2).

The Fifth Circuit also observed, in an alternative holding, that "[e]ven assuming for the sake of argument" that the definition of "security property" created some uncertainty, "[a]ny ambiguity regarding agency intent arising from the text of the regulations themselves may be dispelled by reasonable agency constructions of the regulations." *First Gibraltar*, 19 F.3d at 1045 (Pet. A-25). In fact, the Fifth Circuit had ample authority for looking to the Agency's interpretation of its regulations to resolve any potential ambiguity because this Court followed the same approach in *Fidelity Federal v. de la Cuesta*, 458 U.S. at 158, 102 S.Ct. at 3025.

The regulation at issue in *de la Cuesta* appeared to make the validity of due-on-sales clauses dependent on state contract law. It stated that "[a federal savings and

loan] association continues to have the power to include, *as a matter of contract* between it and the borrower," a due-on-sales clause, which "*shall be exclusively governed* by the *terms of the loan contract*, and all rights and remedies of the association and the borrower shall be *fixed and governed by that contract*." *Id.* at 147, 3019 (emphasis added) (quoting 12 C.F.R. § 545.8-3(f) (1982)). Furthermore, paragraph 15 of the loan contract, which was a part of the Agency's uniform mortgage instrument, provided that "[t]his Deed of Trust shall be governed by the law of the jurisdiction in which the Property is located." *Id.* at 148 n.5, 3020 n.5. This Court concluded that the Agency eliminated any potential ambiguity concerning its preemptive intent through language accompanying the regulation. *Id.* at 158, 3025 ("Any ambiguity in § 545.8-3(f)'s language is dispelled by the preamble accompanying and explaining the regulation."). Similarly, the Fifth Circuit concluded that the Agency made its intent clear through the history, content, and purpose of the regulations themselves, statements accompanying the publication of the final rules, the Agency's Office of General Counsel interpretative letter, and its amicus brief to the Fifth Circuit. *See e.g.*, 12 C.F.R. § 545.6-4(a)(2) (1982); 46 Fed. Reg. 24148, 24151 (April 30, 1981) (Res. App. 17); 12 C.F.R. § 545.2 (1992); Office of General Counsel Letter (Pet. A-77).

The Fifth Circuit admitted, of course, that the Office of General Counsel did not consider the definition of "security property" in 12 C.F.R. § 545.32(c). *Id.* at 1048 (Pet. A-32). The Agency did not address that section, however, because no one, prior to this litigation, had ever suggested that it was meant to place a restriction on the ability of federal associations to offer alternative mortgage instruments. In fact, the Petitioner has never offered

any authority for the contention that the definition of "security property" limits an associations' power to engage in alternative mortgage transactions. *Id.* at 1046 (Pet. A-28). Furthermore, the Agency considered the definition of "security property" in its amicus brief to the Fifth Circuit and stated explicitly that section 545.32(c)(2) did not alter its analysis. OTS Brief at 14 (Res. App. 14). The Fifth Circuit, moreover, found the Agency's interpretation of its regulations to be reasonable, and concluded independently that the Agency's definition of "security property" did not preclude preemption. *First Gibraltar*, 19 F.3d at 1049 ("we conclude that the interpretation of the agency as expressed in the FHLBB Letter is a reasonable one") (Pet. A-36).

The Petitioner, however, insists on *ad hominem* attacks that have no basis in the record. The record, for example, contains no evidence to support the Attorney General's assertion that the Agency's Office of General Counsel acted "extra-legally to effectuate their personal agendas." (Pet. at 13). Nor does the record contain evidence to support the Petitioner's insistent characterization of the Office of General Counsel letter as the private opinion of an agency "functionary" or "bureaucrat." (Pet. at 10, 13-14).

In fact, this Court has recognized that an Office of General Counsel advisory letter is the Agency's interpretation. *See Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 94, 94 S.Ct. 334, 339 (1973) (treating general counsel's advisory letter interpreting a statute as the agency's interpretation). In this case, moreover, the Federal Home Loan Bank Board issued the letter to a cabinet-level agency of the federal government (the Department of Housing and

Urban Development), the letter was published by Commerce Clearing House, and the Agency knew that HUD intended to utilize the letter to convince Texas lenders that a federal presumption had occurred. Fed. Banking L. Rep. (CCH) ¶ 82,502. The OTS, moreover, has confirmed its continuing agreement with the General Counsel Letter. Brief of Amicus Curiae, The Office of Thrift Supervision (Res. App. 1). In such circumstances, the letter can hardly be considered a private opinion.

Similarly, the Petitioner's contention that a preemption by stealth has occurred is untenable. The Agency conducted a three-volume Alternative Mortgage Transactions Research Study, participated in Senate hearings, and submitted its alternative mortgage transactions regulation for public comment. ALTERNATIVE MORTGAGE INSTRUMENTS RESEARCH STUDY (FHLBB 1977); 43 Fed. Reg. 59,336, 59,336 (Dec. 14, 1978). As the Fifth Circuit observed, "[a]ny objection to the agency's decision could and should have been made during the notice-and-comment periods preceding" the adoption of the Agency's 1978 or 1981 regulations. *First Gibraltar*, 19 F.3d at 1048 (Pet. A-33). The court also noted that "the regulations have been amended several times since 1981, and parties opposed to the preemption of Texas homestead law could have made their voices heard at each stage of the regulations' evolution." *Id.* In fact, "[t]he agencies responsible for regulating federal savings associations, however, have never manifested an intent to retreat from the clear preemption of Texas homestead law accomplished in the late 1970s and early 1980s." *Id.*

Furthermore, Congress expressly recognized in the Parity Act that the FHLBB had "adopted regulations authorizing federally chartered depository institutions to engage in alternative mortgage financing." 12 U.S.C.

§ 3801(a)(3). At the time that Congress passed the Parity Act, FHLBB regulations included express authorization for federal associations to engage in reverse mortgages. 12 C.F.R. § 545.6-4(a)(2) (1982). Significantly, the state could have opted out of the Alternative Mortgage Transactions Parity Act within two years of its enactment. 12 U.S.C. § 3804. It chose not to do so.

The Petitioner also appears to assert that the FHLBB could not authorize alternative mortgage instruments nationwide despite conflicting state law unless the regulation referred to specific state laws, such as the Texas homestead exemption law.[8] The Petitioner, however, offers no authority for that contention. Even assuming, moreover, that the failure to refer specifically to Texas homestead exemption law created some ambiguity, the Agency's reasonable interpretation of its regulations eliminates that ambiguity.

The Petitioner also states that the "preemption is discernible only in a Deputy General Counsel's interpretative letter, issued without opportunity for notice or comment." (Pet. i). As the Fifth Circuit recognized, however, the Agency expressly preempted state law in the Agency's alternative mortgage transactions regulation. *First Gibraltar*, 19 F.3d at 1044 (Pet. A-24-25). Before its promulgation, moreover, the Agency submitted the regulation for notice and comment and participated in Congressional hearings. Further, the Department of Housing

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[8] The Petitioner asks the Court to consider "[w]hether Texas' constitutional and statutory provisions protecting homesteads from foreclosure and forced sale are federally preempted when neither federal statutes nor regulations address state homestead provisions. . . . " (Pet. at i).

and Urban Development concluded, before the Office of General Counsel issued its interpretative letter, that Agency regulations had preempted the conflicting provisions of the Texas homestead exemption law. Finally, the Fifth Circuit concluded, independently of the interpretative letter, that the Agency preempted the conflicting provisions of the Texas homestead law.[9] *Id.* at 1045 (Pet. A-26).

The Petitioner also contends that the Fifth Circuit erred in its interpretation of Agency intent because Congress appears in recent legislation to have recognized the Texas homestead laws. As the Fifth Circuit acknowledged, however, a few incidental references to homestead laws do not evince a congressional intent to prohibit the Agency from promulgating a uniform national rule concerning alternative mortgage instruments. *Id.* at 1045 (Pet. A-35-36). The Petitioner also suggests that some practical difficulties may result from the Agency's preemption.

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[9] The Petitioner prominently cites *United States v. Yazell*, 382 U.S. 346, 86 S.Ct. 500 (1966). The question in *Yazell*, however, was "whether in connection with an individualized, negotiated contract, the Federal Government may obtain a preferred right which is *not provided by statute or specific agency regulation*, which was not a part of its bargain, and which requires overriding a state law dealing with the intensely local interests of family property and the protection (whether or not it is up-to-date or even welcome) of married women." *Id.* at 349, 505 (emphasis added). The Court specifically declined "to consider the question of the constitutional power of the Congress to override state law in these circumstances by direct legislation or by appropriate authorization to an administrative agency coupled with suitable implementing action by the agency." *Id.* at 352, 506. In contrast this case involves specific agency action under Congressionally delegated authority.

None of those arguments are convincing. The Petitioner, for example, suggests that "[t]here is no federal general common homestead exemption law." (Pet. at 21). The preemption in this case, however, does not require a federal general common homestead exemption law. In fact, home improvements loans are available under the state's homestead laws, and presumably other kinds of home equity loans would receive similar treatment. Other states, moreover, such as Florida, which have similar but waivable homestead laws, have not experienced unusual problems. Indeed, a finding of preemption in this case would merely permit homeowners in Texas to obtain the same sort of loans currently available in forty-nine other states.

As this Court recognized in *de la Cuesta*, cases of administrative preemption require the consideration of two questions: "(1) did the agency intend to preempt state law, and (2) if so, was the agency acting within the scope of its congressionally delegated authority." *First Gibraltar*, 19 F.3d at 1040 (Pet. App. A-13) (citing *de la Cuesta*, 458 U.S. at 154, 102 S.Ct. at 302). In this case, the Petitioner has conceded for purposes of the petition that the Agency had the authority to preempt the conflicting provisions of Texas law. (Pet. at 22 n.11). The Agency, moreover, has repeatedly expressed its intent to preempt those provisions in the regulations themselves, its statements in the federal register, its Office of General Counsel interpretative letter, and in the OTS' amicus brief to the Fifth Circuit. The Fifth Circuit in this case merely acknowledged overwhelming evidence of Agency intent.

CONCLUSION

The question that the Petitioner asks this Court to resolve concerning the deference due a federal agency's interpretation of its own regulations has been resolved since at least 1945. *Bowles*, 325 U.S. at 413-14, 65 S.Ct. at 1217). The issue arises, moreover, only in an alternative holding, and the Fifth Circuit had ample, independent support for its conclusion that Agency regulations pre-empt the conflicting provisions of the Texas homestead exemption law. Because the Petitioner has not asserted any credible grounds for granting the writ, Respondents respectfully request that the Court deny the petition.

Respectfully submitted,

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Brief of Office of Thrift Supervision

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8170

FIRST GIBRALTAR BANK, FSB,
and BENEFICIAL TEXAS INC.,
Plaintiffs-Appellants,

vs.

DAN MORALES, as ATTORNEY GENERAL
for the STATE OF TEXAS,
and ALBERT ENDSLEY, as TEXAS CONSUMER
CREDIT COMMISSIONER,
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Texas,
Austin Division

BRIEF OF AMICUS CURIAE,
THE OFFICE OF THRIFT SUPERVISION

COMES NOW the Office of Thrift Supervision, an agency within the United States Department of the Treasury, and files this brief of Amicus Curiae pursuant to Rule 29 of the Federal Rules of Appellate Procedure.

I. INTEREST OF THE AMICUS CURIAE

The Office of Thrift Supervision ("OTS") has principal responsibility for regulating federally chartered savings associations, including appellant First Gibraltar Bank, FSB. *See* 12 U.S.C. §§ 1462a(e), 1463(a). This case involves construction of regulations issued by OTS regarding alternative mortgage instruments secured by a lien on a borrower's homestead, and whether these regulations have preemptive effect.

The district court held that the Texas homestead exemption laws that limit foreclosures on homesteads to purchase money mortgages and mortgages for home improvements were not preempted by OTS regulations for federally chartered savings associations. The district court relied on an OTS regulation, 12 C.F.R. § 545.32(c), that the court construed as incorporating state law on the enforceability of mortgage loans.

The plaintiffs appealed, arguing in part that the district court erroneously failed to defer to an opinion of the Deputy General Counsel of the Federal Home Loan Bank Board that concluded that the Board had preempted the Texas homestead exemption laws. OTS is aware that, because the opinion does not discuss the regulation relied upon by the district court, the opinion is of limited utility in determining the meaning of the regulations. OTS accordingly submits this brief as *amicus curiae* in order to explain that the intent of its predecessor agency was to preempt the Texas homestead exemption laws.[1]

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[1] The district court correctly concluded that "the Director [of OTS] has the authority to promulgate regulations that preempt state law." Slip op. at 11.

OTS also wishes to alert the court that this agency currently is considering whether, in light of the district court's order, it may be appropriate to amend the existing OTS regulations to clarify the agency's preemptive intent.

II. SUMMARY OF ARGUMENT

Since 1978, OTS and its predecessor agency, the Federal Home Loan Bank Board have intended to preempt any state laws that impede federally chartered savings association from engaging in alternative mortgage transactions. The original authority to engage in such transactions had preemptive effect, and the Bank Board made the preemption explicit in 1981. Subsequent revisions to Bank Board regulations have preserved this preemptive intent. The regulation relied upon by the district court to find that preemption had not occurred was revised only to deal with security interests in time-share units, and there is no indication that the regulation was intended to diminish the Bank Board's preemption of state law.

III. ARGUMENT

OTS has preempted the Texas homestead laws to the extent that those laws impair the ability of federally chartered savings associations to engage in alternative mortgage transactions.

In the absence of federal statutes or regulations, Texas law would preclude alternative mortgage transactions.[2] Under Article XVI, Section 50 of the Constitution

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[2] The term "alternative mortgage transactions" is defined in 12 U.S.C. § 3802(1). We understand that the types of alternative mort-

of the State of Texas and a similar state statutory provision, a lien on a homestead[3] is not valid unless the encumbrance was "properly fixed on [the] homestead property for: (1) [a] purchase money [mortgage]; (2) taxes

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gage transactions at issue in this appeal are reverse-annuity mortgages and line of credit conversion mortgages. The district order described these instruments as follows: "A reverse mortgage is basically the opposite of a mortgage. Instead of paying a mortgage company regularly scheduled payments in a specified amount, the mortgage company pays the borrower regularly scheduled payments in specified amounts. A line of credit conversion mortgage is a variant of a reverse mortgage. Instead of receiving regularly scheduled payments, the borrower has the option of receiving payments on demand in a desired amount." Slip op. at 2 n.3. This brief also uses the term "home equity conversion lending," which should be understood to encompass both reverse annuity mortgages and line of credit conversion mortgages.

[3] The Texas Property Code § 41.002 defines "homestead" as follows:

> (a) If used for the purposes of an urban home or as a place to exercise a calling or business in the same urban area, the homestead of a family or a single, adult person, not otherwise entitled to a homestead, shall consist of no more than one acre of land which may be in one or more lots, together with any improvements thereon.
>
> (b) If used for the purposes of a rural home, the homestead shall consist of:
>
> (1) for a family, not more than 200 acres, which may be in one or more parcels, with the improvements thereon; or
>
> (2) for a single, adult person, not otherwise entitled to a homestead, not more than 100 acres, which may be in one or more parcels, with the improvements thereon.

Tex. Prop. Code Ann. § 41.002 (Vernon Supp. 1993).

on the property, or work and materials used in constructing improvements on the property. . . . " Tex. Prop. Code Ann. § 41.001 (Vernon Supp. 1993). *See also* Tex. Const. Art. XVI, § 50 (1876, amended 1973).[4]

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[4] The constitution of the State of Texas states, in pertinent part:

> The homestead of a family, or single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of both spouses, in the case of a family homestead, given in the same manner as is required in making a sale and conveyance of the homestead; nor may the owner or claimant of the property claimed as homestead, if married, sell or abandon the homestead without the consent of the other spouse, given in such manner as may be prescribed by law. No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage, or trust deed, or other lien, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married.

Tex. Const. Art. XVI, Sec. 50 (1876, amended 1973). The entire relevant statutory provision reads:

> § 41.001. Interests in Land Exempt from Seizure
> (a) A homestead and one or more lots used for a place of burial of the dead are exempt from seizure for the claims of creditors except for encumbrances properly fixed on homestead property.

Since 1978, the OTS and its predecessor agency, the Federal Home Loan Bank Board (the "Board"), have intended to preempt all state laws that directly or indirectly restrict the ability of savings associations to engage in alternative mortgage transactions. The original authorization by the Board to engage in alternative mortgage transactions had preemptive effect, and the Board subsequently made that preemption explicit. Later revisions to the preemption regulation were not intended to diminish the preemptive effect of the Board's rules.

A. The 1978 Alternative Mortgage Instruments Regulation

In 1978, the Board authorized federal savings associations to engage in a variety of alternative mortgage transactions, including "reverse-annuity mortgages," which it defined as an "instrument [that] provides periodic payments to homeowners based on accumulated equity." 12

(b) Encumbrances may be properly fixed on homestead property for:

(1) purchase money;

(2) taxes on the property; or

(3) work and material used in constructing improvements on the property if contracted for in writing before the material is furnished or the labor is performed and in a manner required for the conveyance of a homestead, with joinder of both spouses if the homestead claimant is married.

(c) The homestead claimant's proceeds of a sale of a homestead are not subject to seizure for a creditor's claim for six months after the date of sale.

Tex. Prop. Code Ann. § 41.001 (Vernon Supp. 1993).

C.F.R. § 545.6-2(d)(1) (1979).[5] The Board explained that "reverse-annuity mortgage[s] are hereby authorized *nationwide*. The Bank Board believes these instruments are necessary, in addition to standard fixed-rate, fixed-payment mortgages, in order to meet the needs of homeowners during different phases of their financial life cycles." 43 Fed. Reg. 59336 (December 14, 1978) (emphasis added). The Supreme Court has recognized that the nationwide authorization of a particular lending practice preempts any impeding state law. *Fidelity Federal Savings & Loan Association v. De La Cuesta*, 458 U.S. 141, 159 (1982).

B. Explicit Preemption Regulations, 1981-1982

Although the Board's "nationwide authorization" of reverse-annuity mortgage as sufficient to preempt any restrictions in state law, the Board added an explicit preemption provision to the alternative mortgage instruments regulation in 1981. The provision stated that:

> [t]his [alternative mortgage instruments] regulation is promulgated pursuant to the plenary and exclusive authority of the Board to regulate all aspects of the operations of Federal associations, as set forth in 5(a) of the Home Owners' Loan Act of 1933, as amended. This exercise of the Board's authority is preemptive of any state law purporting to address the subject of a Federal association's ability or right to make, purchase,

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[5] Other alternative mortgage transactions authorized included graduated payment mortgages and variable rate mortgages. *See* 12 C.F.R. § 545.6-2(b), (c) (1979).

> or participate in the alternative mortgage instruments set forth in this section [545.6-4], or to directly or indirectly restrict such ability or right.

12 C.F.R. § 545.6-4(a)(2) (1982). The Board believed – and OTS believes now – that this provision preempted the Texas homestead laws to the extent those laws impeded reverse-annuity mortgage lending by federal savings associations.

This preemption provision was modeled on and was virtually identical to a preemption provision promulgated at the same time in the regulation governing adjustable mortgage loans ("AMLs").[6] The preamble to the AML regulation stated that, with respect to AMLs, "[t]he Board's exercise of this authority is preemptive of any state law purporting to restrict the ability or right of any federal association or federal savings bank to use [AML] instruments." 46 Fed. Reg. 24151 (April 30, 1981). The Board explained that "[t]his preemption has the effect of

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[6] "An adjustable mortgage loan is a loan that permits adjustment of the interest rate." 12 C.F.R. § 545.6-4a(b)(1) (1982). As to preemption, the AML regulation stated:

> This regulation is promulgated pursuant to the plenary and exclusive authority of the Board to regulate all aspects of the operations of Federal associations, as set forth in 5(a) of the Home Owners' Loan Act of 1933, as amended. This exercise of the Board's authority is preemptive of any state law purporting to address the subject of a Federal association's ability or right to make, purchase, participate, or otherwise deal in adjustable mortgage loans, or to directly or indirectly restrict such ability or right.

12 C.F.R. § 545.6-4a(a)(2) (1982).

precluding the application of the laws of approximately 30 states prohibiting the charging of interest on interest." *Id.*

When it published the final regulation, the Board stated that it intended to achieve for alternative mortgage instruments the same preemptive effect that it provided for AMLs: "[t]he Board also takes this opportunity to amend 12 C.F.R. § 545.6-4, pertaining to other alternative mortgage instruments, by inserting a similar preemption of inconsistent state law." *Id.*

The preemptive effect of the alternative mortgage instruments regulation was re-affirmed several months later, when the Board amended the reverse mortgage regulation for other reasons. The Board was explicit that the preemption in "the alternative mortgage instruments regulation . . . covers the [reverse-annuity mortgage] amendments as well." 46 Fed. Reg. 51896 (October 23, 1981).

C. 1982 Revisions to Real Estate Lending Regulations

In 1982, the Board, acting in response "to a number of requests to authorize the issuance of new and viable types of mortgage instruments," 47 Fed. Reg. 36612 (August 23, 1982), consolidated various regulations granting specific authority to federal associations to engage in real estate lending. The Board "replace[d] . . . the regulations authorizing the use of specific types of mortgage instruments with a general authorization to make home loans on which the interest rate, the payment, the loan balance and the term of maturity could be adjusted." *Id.*

Among the instruments included in the revised regulation were reverse-annuity mortgages. *Id.*

The revised regulation, encompassing "other residential real estate loans," was codified at 12 C.F.R. § 545.6-2, and it was covered by virtually the same broad preemption language that was added to the alternative mortgage transaction regulations in 1981. Specifically, the new regulation stated in part that:

> This exercise of the Board's authority is preemptive of any state law purporting to address the subject of a Federal association's ability or right to make, sell, purchase, participate or otherwise deal in the mortgage loan instruments set forth in this part, or directly or indirectly to restrict such ability or right.

12 C.F.R. § 545.6(a)(2) (1983).

D. 1983 Revision of the Preemption Regulation

Following the passage of the Garn-St. Germain Depository Institutions Act of 1982, the Board issued new regulations to implement the enhanced authority granted to the agency under that legislation. The regulations on other residential real estate loans was re-codified at 12 C.F.R. § 545.33(c) (1984).

The Board's sole purpose was to revise Part 545 "to permit Federal associations to engage in all activities authorized by statute subject to these regulations and to incorporate various technical amendments. These amendments expand the investment authority of, and services offered by, Federal associations." 48 Fed. Reg. 23032 (May 23, 1983).

The 1983 regulations were not intended to diminish existing lending authority. The revised regulations were part of a "new approach" to the promulgation of regulations "[i]n order to grant associations the maximum flexibility to exercise the authorities of the HOLA." *Id.* The changes to Part 545 constituted a "simplification, reduction and renumbering of existing authority." *Id.* Under the new approach, "[t]he Board emphasizes that deletion of sections specifically implementing existing authority does not mean that any authority can no longer be exercised." *Id.* Specifically with respect to reverse annuity mortgages – home equity conversion loans – the preamble states that "the substance of these provisions is unchanged from the Board's prior regulations." 48 Fed. Reg. 23037-23038 (May 23, 1983).[7]

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[7] In this summary, the Board is referring to Section 545.33(c) governing amortization which originally read: "the loan may be fully amortized, partially amortized, nonamortized, or a line-of-credit loan. The loan contract may provide for the deferral of principal and capitalization of a portion of the interest, or of all interest on loans to natural persons secured by borrower-occupied property and on which periodic advances are being made." 12 C.F.R. 545.33(c) (1983). Most of this provision was later moved to Section 545.32(b) by a "technical correction" to the regulations made in October of 1984. 49 Fed. Reg. 43040 (October 26, 1984). The summary accompanying those changes simply noted that "[t]he substance of the regulations is unchanged but the relocation of the amortization language clarifies that any real estate loan may be fully or partially amortized, nonamortized or a line-of-credit loan, subject to the relevant regulations applicable to the particular type of loan." 49 Fed. Reg. 43041 (October 26, 1984). Amortization language was retained in the revised Section 545.33: "[t]he loan contract may provide for the deferral and capitalization of all interest on loans to natural persons secured by borrower occupied property

As part of its effort to simplify the regulations and maximize the ability of federal associations to exercise their powers under HOLA, the Board promulgated a single preemption regulation that covered all operations of federal associations. The new preemption provision stated:

> The regulations in this Part 545 are promulgated pursuant to the plenary and exclusive authority of the Board to regulate all aspects of the operations of Federal associations, as set forth in section 5(a) of the Home Owners' Loan Act of 1933, 12 U.S.C. 1464, as amended. This exercise of the Board's authority is preemptive of any state law purporting to address the subject of the operations of a Federal association.

12 C.F.R. § 545.2 (1984). This regulation is substantially similar to the earlier preemption provision in § 545.6(a)(2). The only change was to substitute "the operations of a Federal association" for the phrase "a Federal association's ability or right to make, sell, purchase, participate or otherwise deal in the mortgage loan instruments set forth in this part, or directly or indirectly to restrict such ability or right." Although the Board did not discuss the reason for this change, it is evidence that, in view of the Board's expressed desire for simplification, the change in language was necessary to cover all operations of a Federal association and to enable the preemption provision to encompass operations beyond mortgage loan instruments. There is no basis for supposing that the

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and on which periodic advances are being made." 12 C.F.R. 545.33(a).

Board intended to reduce the preemptive effect of its regulations.

E. 1983 Revision of the Real Estate Lending Regulation

Specific revisions to the real estate lending regulation in 1983 also reflected the Board's preemptive intent. As revised in 1983 (and in its still current form), section 545.32 provides broad authority to federal savings associations to engage in alternative mortgage lending. Under *De La Cuesta,* this authorization has preemptive effect. Section 545.32(b)(4) specifically authorizes associations to make reverse mortgages by explicitly permitting the use of those amortization techniques associated with reverse mortgages and authorizing the use of line of credit loans. The regulation states in pertinent part: "a real estate loan may be fully amortized, partially amortized, nonamortized, or a line of credit loan, and the loan contract may provide for the deferral of principal and capitalization of a portion of the interest." 12 C.F.R. 545.32(b)(4).

The district court below, however, did not address section 545.32(b)(4) and instead focused on another part of the 1983 real estate lending regulation relating to "security property." To a limited extent, the definition of "security property" is a successor to a provision defining loans secured by real estate which appeared in previous regulations. The language of the "security property" definition relied upon by the district court, however, was not introduced until 1983. In response to concerns abut the classification of loans made by associations secured by an interest in a time-share unit, the Board in 1983 revised the

real estate lending regulation for the purpose of ensuring that "an association may make a real estate loan on the security of a time-share unit if the security property is real estate under state law." 48 Fed. Reg. 23036 (May 23, 1983). The provision stated in part that: "A loan is made on the security of real estate if . . . [t]he security interest of the Federal savings association may be enforced as a real estate mortgage or its equivalent pursuant to the law of the state in which the property is located." 12 C.F.R. 545.32(c)(2). The district court below concluded that the language of section 545.32(c) regarding "enforceability" as a real estate mortgage "pursuant to the law of the state in which the property is located," which had not appeared in previous regulations, meant that the Bank Board and OTS had not preempted the Texas prohibition on home equity lending. Slip op. at 14.[8]

We respectfully believe that the district court misconstrued the Board's intent. It is anomalous, in view of sections 545.2 and section 545.32(b)(4), to construe a revision of a regulation directed at interests in time-share units as diminishing the Board's preemptive intent. The Board's, and now OTS', preemption of state law has

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[8] In addition, the district court ruled that an opinion issued by the Federal Home Loan Bank Board ("the Board") supporting preemption was unreasonable. Slip op. at 16. The opinion issued by the General Counsel of the Board on August 4, 1989 concluded that the regulations governing alternative mortgage lending by federal associations pre-empt the restrictions of the Texas homestead laws. We believe this opinion is additional evidence of the agency's intent to preempt state laws that interfere with this authority. We note, however, that the opinion does not discuss the regulation that concerned the district court, 12 C.F.R. § 545.32(c)(2).

remained intact since 1978. It preempts the Texas homestead laws to the extent these laws impede alternative mortgage transactions by federal savings associations.

OTS is, of course, cognizant that section 545.32(c)(2) appears to raise a question as to the preemptive effect of sections 545.2 and 545.32(b)(4). The agency now is considering how appropriately to remove any uncertainty that may exist as to the agency's preemptive intent.

IV. CONCLUSION

OTS respectfully requests that this Court reverse the decision and order of the District Court.

Dated: July 21, 1993

CAROLYN B. LIEBERMAN
Acting Chief Counsel

/s/ Dwight C. Smith
Dwight C. Smith III
Deputy Chief Counsel

Jonathan H. Talcott
Staff Attorney

OFFICE OF THE CHIEF COUNSEL
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* * *

43 Fed. Reg. 59336, 59336 (Dec. 20, 1978)
(Summary to Final Rule)

SUMMARY: These regulations authorize a number of new types of mortgage instruments for use by Federal savings and loan associations: the variable rate mortgage, graduated payment mortgage, and reverse-annuity mortgage. The variable rate mortgage will, where found to be needed, be authorized on a state-by-state basis; the graduated payment mortgage and reverse-annuity mortgage are hereby authorized nationwide. The Bank Board believes these instruments are necessary, in addition to the standard fixed-rate, fixed-payment mortgage, in order to meet the needs of homeowners during different phases of their financial life cycles.

EFFECTIVE DATE: January 1, 1979

* * *

46 Fed. Reg. 51893, 51893 (Oct. 21, 1981)
(Summary to Final Rule)

SUMMARY: The Federal Home Loan Bank Board hereby amends its regulation authorizing federally-chartered thrift institutions to make non-amortized and partially-amortized loans by raising the maximum loan-to-value ratio from 60 to 95 percent, removing the existing five-year maximum on the terms of such loans, and permitting the interest rates on such loans to be adjusted periodically. The Board also liberalizes its regulation authorizing the issuance of reverse-annuity mortgage loans by deleting the requirements that such loan plans be submitted to the Board, that lenders offer refinancing of such loans at maturity, and that such loans bear a fixed

interest rate. These actions are intended to enhance associations' ability to balance the yields of their investment portfolios with their liabilities, and to meet borrowers' needs for additional home-financing options.

EFFECTIVE DATE: October 21, 1981.

* * *

46 Fed. Reg. 24148, 24151 (April 30, 1981)
(Federal Preemption of State Laws)

Federal Preemption of State Laws

In the AML regulation, the Board codifies its view that the regulation is promulgated pursuant to the Board's plenary and exclusive authority to regulate all aspects of the operations of Federally-chartered savings and loan associations and mutual savings banks. As such, the Board's exercise of this authority is preemptive of any state law purporting to restrict the ability or right of any Federal association or Federal savings bank to use adjustable mortgage loan instruments. This preemption has the effect of precluding the application of the laws of approximately 30 states prohibiting the charging of interest on interest. The Board also takes this opportunity to amend 12 CFR 545.6-4 pertaining to other alternative mortgage instruments, by inserting a similar preemption of inconsistent state law.

* * *

46 Fed. Reg. 51893, 51895 (Oct. 23, 1981)
(Reverse-Annuity Mortgages)

Reverse-Annuity Mortgages

The Board has determined to amend its reverse-annuity mortgage (RAM) regulation (12 CFR 545.6-4(c)) substantially as proposed. Thus, the provision requiring submission of each RAM program to the Board for a 60-day review period is deleted. The Board is of the view that the regulation is specific enough as to the structure and required disclosure of RAMs that such review is unnecessary. In addition, the requirement that the interest rate be fixed is removed. The Board believes these changes will greatly improve the marketability of RAM loans, which have not been widely used by federal associations.

* * *

46 Fed. Reg. 51893, 51896 (Oct. 23, 1981)
(Federal Preemption)

Federal Preemption

The final regulation contains language expressly preempting any state law that purports to prevent a federal association from making, purchasing, selling or otherwise dealing in residential real estate loans authorized under 12 CFR 545.6-2. The Board notes that the alternative mortgage instruments regulation authorizing the making of RAMs already contains such preemptive language (12 CFR 545.6-4(a)(2)). This language covers the RAM amendments as well.

* * *

48 Fed. Reg. 23032, 23032 (May 23, 1983)
(Summary to Final Rule)

SUMMARY: The Federal Home Loan Bank Board has implemented the new powers granted to Federal associations by the Garn-St Germain Depository Institutions Act of 1982 by issuing new regulations on public unit NOW accounts, demand deposits, commercial lending, and operating leases, and by amending its regulations on real estate lending, consumer loans, commercial paper and corporate debt security investments, investments in government securities, service corporation activities and limits on loans to one borrower. The Board has also made revisions to its regulations to permit certain suretyship and trust activities and collateralization of deposits. Further, the Board has revised Part 545 to permit Federal associations to engage in all activities authorized by statute subject to these regulations and to incorporate various technical amendments. These amendments expand the investment authority of, and services offered by Federal associations.

EFFECTIVE DATE: May 26, 1983.

* * *

48 Fed. Reg. 23032, 23032 (May 23, 1983)
(Scope of Authority)

Scope of Authority

Current Part 545 is based upon the premise that the investment authority of the HOLA must be implemented expressly by regulation. Many of the provisions of the statute, however, do not require regulatory action. In order to grant associations the maximum flexibility to exercise the authorities granted by the HOLA, the Board

has determined to revise the general approach to regulating investment activities of Federal associations. Accordingly, Part 545 now addresses the authority of associations only to limit, interpret or recognize incidental authority. Federal associations may exercise all of the authority granted by the HOLA subject only to limitations contained in the regulations. Because this approach differs from the current treatment, these amendments to Part 545 include a section specifically stating that Federal associations may exercise all statutory authority subject to the limitations in this Part. The Board emphasizes that deletion of sections specifically implementing existing authority does not mean that any authority can no longer be exercised. In addition, to facilitate the transition to the new rules, § 545.3 provides that until December 31, 1983, associations may continue to rely on the regulations as they existed prior to adoption of these amendments.

48 Fed. Reg. 23032, 23032-33 (May 23, 1983)
(Federal Preemption)

Federal Preemption

The proposal included a new section stating specifically the Board's intent that these regulations preempt state law. The preemptive effect of the Board's regulations has been amply recognized by the courts; it derives from and is an integral part of the Board's exercise of its authority under Federal law. Although a statement is unnecessary to give these regulations preemptive effect, the Board desires to make clear its views on the preemptive nature of the authority conferred on Federal associations by the HOLA and the Board's regulations.

* * *

48 Fed. Reg. 23032, 23037-38 (May 23, 1983)
(Home Loans)

Home Loans

General. Section 545.33 of the regulations defines a home loan as one made on the security of homes, including a unit of a condominium or cooperative, combination of homes and business property, farm residences, and combinations of farm residences and commercial farm real estate, and states the applicable limitations. The existing maximum term of 40 years for a home loan has been retained, as has the requirement for semi-annual payments of interest, except as expressly authorized. Home loans must be repaid in semi-annual installments, except for those loans that are nonamortized (*i.e.*, interest-only loans) or that are line-of-credit loans. Nonamortized loans, by their nature, require no repayments of principal until maturity and the Board has expressly excluded them in order to clarify its position with respect to questions that have arisen about repayment of principal on such home loans.

In response to comments on the matter of repayments of principal, the Board is amending the regulations pertaining to the loans on the security of farm residences and combinations of farm residences and commercial farm real estate. Borrowers that obtain such loans often receive their income on an annual basis concurrently with their crop sales. The Board believes that associations providing services to this type of borrower should have the flexibility to structure the loan repayments to meet the ability of these borrowers to pay. Accordingly, § 545.33

expressly authorizes home loans to such borrowers to be repaid in at least annual installments.

Section 545.33 of the final amendments states that a home loan may be fully amortized (principal payments made over the term of the loan), partially amortized (balloon loan), nonamortized (interest-only), or a line-of-credit loan (either open-end or closed-end). In addition, the loan contract may provide for negative amortization of a portion of the interest, or of all interest on a loan such as a reverse annuity mortgage. The substance of these provisions is unchanged from the Board's prior regulations. As provided in § 545.33(b)(3), an association may also receive part of the consideration for making a home loan in the form of a share of the property's appreciation since origination or as allowed by the Board ruling at § 555.19.

* * *

48 Fed. Reg. 23031, 23039-40 (Loan-to Value Ratios)

Under the disclosure regulations adopted in August 1982, an association was required to disclose a "description of all contractual contingencies under which the loan may become due or which may result in a forced sale of the home." This language caused some uncertainty about exactly what information must be disclosed. As a result there has been a lack of uniformity in the types of information being received by prospective borrowers. The final amendments clarify this language by excluding from this requirement the standard default provisions that arise "from the borrower's breach or nonperformance of an obligation under the loan contract or mortgage." The Board believes that compliance with this provisions will

not be unduly burdensome because most mortgage instruments contain relatively few such provisions. For example, this paragraph would require disclosure of provisions in a contract for a reverse annuity mortgage under which the outstanding loan principal may become due and payable as a result of the borrower's death, upon maturity of the loan, or upon a failure to maintain the security property.

* * *

HUD, Request for FHLBB Opinion, by John A. Maxim, Jr., dated Nov. 16, 1988

November 16, 1988

Mr. Jordan Luke
General Counsel
Federal Home Loan Bank Board
1700 "G" Street, N.W.
Washington, D.C. 20552

Dear Mr. Luke:

SUBJECT: Federal Preemption of Texas Homestead Mortgage Restrictions for Home Equity Conversion Mortgages

As we explained in a request for opinion dated September 26, 1988, this Department is implementing a demonstration program to insure home equity conversion mortgages (i.e., reverse mortgages) under Section 255 of the National Housing Act, as added by Section 417 of Pub. L. 100-242. Our September 26 request concerned the extent to which the preemption regulations of the Federal Home Loan Bank Board (Board) under Title VIII of the Garn-St. Germain Depository Institutions Act of 1982

(Garn-St. Germain Act) apply to line of credit reverse mortgages. We also now desire an opinion on whether Title VIII of the Garn-St. Germain Act and implementing regulations preempt the restrictions on homestead mortgages in Texas. If not preempted, those restrictions would prevent many lenders from making any reverse mortgages in Texas.

The Texas State Constitution (Art. 16, § 50) and the Texas code (V.T.C.A., Property Code § 41.001 and 41.002) protect a "homestead" from any forced sale (e.g., a foreclosure sale) by a creditor, with only three exceptions: when the debt is (1) for the purchase of the homestead, (2) for taxes on the homestead, or (3) for work and material used in constructing improvements on the homestead. A borrower may only waive its homestead exemption by failure to raise the exemption as a defense in legal proceedings. *Sudderth v. Howard*, 560 S.W. 2d 511 (Civ. App. 1977). Since the exemption cannot be waived when the loan is originated, creditors only will make a loan secured by a homestead if covered by one of the three exceptions.[1] Our Regional Counsel's Office in Fort Worth advises that regular home equity lines of credit are

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[1] While many state laws provide for a homestead exemption, generally such exemptions either can be waived at origination or are limited to a specific dollar amount. For example, the mortgage forms commonly used for conventional residential mortgage loans, issued by the Federal National Mortgage Association and the Federal Home Loan Bank Board, contain homestead waiver provisions in eighteen states. We are not aware of any states other than Texas in which the homestead exemption would be both absolute and non-waivable when applied to reverse mortgages.

unavailable in Texas for this reason. The reverse mortgages to be insured under our demonstration program will not be covered by any of the three exceptions to the Texas homestead exemption. Further, a significant proportion of mortgages insured under the Department's programs are made by state-chartered lenders, such as mortgage bankers, which would clearly be subject to the restrictions of Texas law in the absence of Federal preemption.[2]

Title VIII of the Garn-St. Germain Act provides that state-chartered lenders (other than banks and credit unions) may make "alternative mortgage transactions" in accordance with regulations of the Board in order to provide them with "parity" with Federally-chartered institutions. Section 804(c) provides that "[A]n alternative mortgage transaction may be made . . . notwithstanding any State constitution, law or regulation." We interpret Section 804(c) to apply only to those alternative mortgage transactions made in accordance with regulations as required by Section 804(a)(3). The applicable regulations under Title VIII (except for banks and credit unions) are identified in the Appendix at the end of 12 CFR Part 545, and include Sections 545.32(b)(4) and 545.33(c). Section 545.32(b)(4) states that a loan can be " . . . fully amortized, partially amortized, nonamortized, or a line-of-credit loan, and the loan contract may provide for the deferral

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[2] For purposes of this request for an opinion, we have assumed that the restrictions of Texas law discussed in this letter are preempted for Federally-chartered savings and loan associations regulated by the Board. *See* 12 CFR 545.2. Please advise us if this assumption is incorrect.

and capitalization of a portion of the interest." Section 545.33(c) provides that "[T]he loan contract may provide for the deferral and capitalization of all interest on loans . . . which periodic advances are being made."

Title VIII, by its express terms, is clearly applicable in all states. Moreover, Sections 545.32(b)(4) and 545.33(c) are broad enough to clearly preempt many of the usual state law obstacles to reverse mortgages. We have some doubt, however, whether Section 804 and the applicable regulations have the effect of preempting the Texas law of homesteads, since the state law does not appear to be a special restriction on state institutions issuing alternative mortgages, but broadly encompasses even traditional second mortgages issued by any state-chartered lender. Additionally, while Section 545.32(b)(4) and 545.33(c) enumerate some types of loan contracts that are permitted under Title VIII, the regulations do not expressly address the unique homestead mortgage restrictions in Texas. We have had many inquiries, from persons who are aware of the Texas homestead mortgage exemption, about whether our reverse mortgage demonstration will be available in Texas. We have been unable to give any definitive answer in the absence of an authorative interpretation of the Board's preemptive regulations under Title VIII of the Garn-St. Germain Act.

We suggest two lines of argument supporting a preemption of the Texas restrictions. First, we believe that it would be inconsistent with the purposes of Title VIII of the Garn-St. Germain Act to have regulations which permit reverse mortgages in 49 states but exclude Texas, since Title VIII was broadly intended to remove differences among states with regard to lender ability to make

alternative mortgage transactions, including reverse mortgages. Even if the Board's regulations *could* be interpreted to exclude Texas, we believe the opposite interpretation is called for in light of the statutory purposes of Title VIII. As a second line of argument, we believe that it would be inconsistent with Title VIII to preempt only some types of state law obstacles to reverse mortgages and not others. As long as reverse mortgages are authorized by the Board's regulations, Section 804(c) appears to preempt "*any* State constitution, law or regulation" (emphasis added) which would prevent a lender from making such mortgages. The Board does not appear to have the power to choose which state restrictions will be preempted.

Since we had contacted you last, the Department has issued its proposed rule on insurance for reverse mortgages at 53 Fed. Reg. 43156 (Oct. 25, 1988). The rule proposes to allocate the insured mortgages among the ten HUD Regions and current plans are to announce the allocations in early January. The purpose of this allocation is to provide lenders and elderly individuals in all states, including Texas, with an opportunity to participate in this program. While we believe that Title VIII of the Garn-St. Germain Act and the applicable regulations are broad enough to include reverse mortgages in Texas, we would appreciate your opinion.

Mary K. Roma of my staff has informally discussed these issues with Mr. Richard Katz who is in receipt of our September 26th request for opinion. If you have any further questions, please contact Ms. Romas at 755-5272, or Donald Alexander at 755-7070.

Thank you for considering this issue.

Sincerely,

/s/ John A. Maxim, Jr.
John A. Maxim, Jr.
Associate General Counsel
for Insured Housing
and Finance

We were similarly concerned with the mortgagee's ability to enforce a due-on-sale clause on these line of credit home equity conversion mortgages which would probably not involve the "periodic payments" discussed in section 591.2(n). However, we obtained a copy of an opinion by Mr. Jack D. Smith, your Deputy General Counsel, which stated that the periodic payment characteristic was satisfied if the mortgagor had the option of receiving such payments. We therefore request an opinion from your office as to whether a similar interpretation can be applied to the term "and on which periodic advances are being made" in section 545.33(c) and whether these line of credit reverse equity mortgages would meet the requirements for federal preemption. If you have any additional questions, please contact Ms. Kathy Davies at 755-7080, or Donald B. Alexander at 755-7070. Thank you for your consideration of these issues.

Sincerely,

/s/ Illegible for John A. Maxim, Jr.
John A. Maxim, Jr.
Associate General Counsel
for Insured Housing
and Finance